UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLSTATE INSURANCE COMPANY, an Illinois corporation, as successor in interest to Northbrook Excess & Surplus Insurance Company, formerly known as Northbrook Insurance Company, pursuant to merger effective January 1, 1985,	:	01 Civ. 10715 (HBP)
Plaintiff,	:	OPINION AND ORDER
-against-	:	
AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation,	:	
Defendant.	:	

PITMAN, United States Magistrate Judge:

I. Introduction

This action arises out of a contract dispute between Allstate Insurance Company ("Allstate") and American Home Products Corporation, now known as Wyeth ("Wyeth"). Both parties move for summary judgment on the issue of whether Allstate is obligated under its excess insurance policies to pay the costs of defending products liability lawsuits brought against Wyeth. All parties have consented to my exercising plenary jurisdiction in the case pursuant to 28 U.S.C. § 636(c).

For the reasons set forth below, Allstate's motion for summary judgment is denied and Wyeth's cross-motion for summary judgment is granted in part and denied in part.

II. Facts

A. The Insurance Policies

1. The Excess Policies

From 1980 to 1984, Wyeth purchased 20% of its first layer of excess products liability insurance from Allstate (Defendant's Statement Pursuant to Local Rule 56.1 in Support of Its Motion for Summary Judgment, dated Mar. 5, 2004 ("Def.'s 56.1") ¶ 2; Responding Statement by Plaintiff Pursuant to Local Rule 56.1 in Opposition to Defendant's Motion for Summary Judgment, dated Apr. 23, 2004 ("Pl.'s Opp. 56.1") ¶ 2; Plaintiff's Rule 56.1 Statement of Uncontested Facts, dated Mar. 5, 2004 ("Pl.'s 56.1") ¶ 23; Wyeth's Responding Statement to Plaintiff's Rule 56.1 Statement of Uncontested Facts, dated Apr. 23, 2004 ("Def.'s Opp. 56.1") ¶ 23).[1] The material terms and conditions of the excess insurance agreements for the periods from 1980 to

[1]The first layer of excess insurance was coverage that attached after a certain amount of underlying primary insurance had been exhausted, which varied depending on the type of coverage provided (Def.'s 56.1 ¶ 2; Pl.'s Opp. 56.1 ¶ 2). See In re Sept. 11th Liab. Ins. Coverage, 458 F. Supp.2d 104, 109 nn.2, 3 (S.D.N.Y. 2006) (defining first layer excess insurance).

1981 and 1981 to 1984 were set forth in two written insurance policies (the "Excess Policies") (Stipulation as to Certain Policies, dated Mar. 5, 2004 ("Stip."), annexed in turn as Exhibit ("Ex.") 6 to the Declaration of Christopher J. Bannon, Esq., in Support of Plaintiff's Motion for Summary Judgment, dated Mar. 5, 2004 ("Bannon Decl.")). The Excess Policies provided that Allstate would insure Wyeth against liability to third parties by increasing the insurance limit of underlying insurance policies to stated amounts (Northbrook Excess and Surplus Insurance Company, Excess Liability Coverage Policy Number 63-006-825, countersigned June 24, 1980 ("1980 Policy") at NB 00000114, Excess Liability Coverage Policy Number 63-008-121, countersigned July 13, 1981 ("1981 Policy"), at WYETH 000753, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl.). Subject to certain exceptions, the scope of the coverage Allstate provided to Wyeth was the same as that provided in the underlying policy, and the increased amount of coverage was available to Wyeth only after the limits of that underlying policy were exhausted[2] (1980 Policy at NB 00000114, 1981 Policy

[2]Specifically, the Excess Policies provided:

> As respects occurrences taking place during the policy period, [Allstate] hereby agrees to afford such additional liability insurance as the issuer of the Underlying Policy specified below would afford by increasing the amount of each Underlying Policy limit listed below to the amount shown opposite such

(continued...)

at WYETH 000753, annexed as Exs. A & B, respectively, to Stip., annexed in turn as Ex. 6 to Bannon Decl.).

Under a heading entitled "Maintenance of Underlying Insurance," the Excess Policies required Wyeth to maintain each applicable underlying policy "in full effect" as a condition for Allstate's payment of any claims under the Excess Policies (1980 Policy at NB 00000114, 1981 Policy at WYETH 000753, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl.). The Excess Policies also provided:

> This policy is subject to the same warranties, terms and conditions (except as regards the premium, the obligation to investigate and defend, the amount and limits of liability and the renewal agreement, if any, and except as otherwise provided herein) as are contained in or as may be added to the Underlying Policy prior to the happening of an occurrence for which claim is made . . .

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[2](...continued)

> Underlying Policy limit in the Total Limits column; PROVIDED that liability shall attach to [Allstate] (a) only in excess of Underlying Policy coverage which is subject to a limit listed below, and (b) only after the issuer of the Underlying Policy had paid or has been held liable to pay the full amount of the applicable limit of the said policy, and (c) only as repects such additional amounts in excess thereof as would be payable by the issuer of the Underlying Policy if the said policy were amended as aforesaid

(1980 Policy at NB 00000114, 1981 Policy at WYETH 000753, annexed as Exs. A & B, respectively, to Stip., annexed in turn as Ex. 6 to Bannon Decl.).

(1980 Policy at NB 00000114, 1981 Policy at WYETH 000753, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl. (emphasis added)).

The Excess Policies stated that Wyeth's "Underlying Policy" for the purposes of "Products and Completed Operations Liability" coverage, was a self-insured retention[3] of five million dollars (1980 Policy at NB 00000123, 1981 Policy at WYETH 000758, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl.; Pl.'s 56.1 ¶ 13; Def.'s Opp. 56.1 ¶ 13).[4]

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[3]Where the holder of an excess insurance policy does not purchase underlying primary insurance, the dollar amount of a loss that is retained by the policyholder and not covered by the excess insurance is referred to as a "self-insured retention." The parties may tailor a self-insured retention so that the policyholder only self-insures with respect to "losses," i.e., damage awards or settlement payments, while the excess insurer provides coverage for "loss-adjustment," i.e., the investigation, appraisal, settlement or defense of claims, or for the expenses of loss adjustment. 2 Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 13.13 at 1088 (14th ed. 2008).

[4]Specifically, the Excess Policies stated, "Underlying Policy: See Endorsement [number] 4" (1980 Policy at NB 00000114, 1981 Policy at WYETH 000753, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl.). Endorsement 4, in turn, stated in relevant part:

> SCHEDULE OF UNDERLYING POLICIES
>
> Carrier, Policy # & Period
> . . . .
> 2) Self Insured Retention except for the 1st $6,000,000 CSL Foreign which is insured with AFIA
>
> Type of Policy
> . . . .

(continued...)

The parties both agree that Wyeth's self-insured retention, in turn, "was deemed to operate in accordance with the terms and conditions of" a policy issued by the Midland Insurance Company to Wyeth for primary coverage for the period from November 1, 1976 to November 1, 1977 (the "Midland Policy") (Def.'s 56.1 ¶ 11; Pl.'s Opp. 56.1 ¶ 11).

2. The Midland Policy

The Midland Policy expressly required Midland to defend Wyeth against lawsuits seeking damages for bodily injury caused by an "occurrence:"

> Midland Insurance Company (. . . herein called the company) . . . agrees with the named insured as follows:

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[4](...continued)

> Products and Completed Operations Liability $5,000,000 aggregate (worldwide) including . . . .
>
> Applicable Limits
>
> . . . .
>
> Combined Single Limit For Bodily Injury and Property Damage Combined $5,000,000 each occurrence (where applicable)

(1980 Policy at NB 0000121, 1981 Policy at WYETH 000758, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl.). Neither the parties' briefs nor their Rule 56.1 Statements address the existence or significance of the phrase "except for the 1st $6,000,000 CSL Foreign which is insured with AFIA" in Endorsement 4. Accordingly, I consider any argument as to this provision to be waived. Design Strategy, Inc. v. Davis, 469 F.3d 284, 300 (2d Cir. 2006); accord In re Monster Worldwide, Inc. Sec. Litig., 251 F.R.D. 132, 137 (S.D.N.Y. 2008) ("[T]his argument was raised for the first time at oral argument and so was waived in terms of this motion.").

* * *

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

(Midland Insurance Company, General Liability-Automobile Policy No. GL 195558, countersigned Feb. 1, 1977 ("Midland Policy"), at NBK 0000374, annexed as Ex. C to Stip., annexed in turn as Ex. 6 to Bannon Decl.).[5]

In addition, the Midland Policy included two statements that explicitly addressed Midland's payment of the expenses of defending Wyeth. First, the Midland Policy provided, under the heading "Supplementary Payments," that Midland would pay all expenses that it incurred while defending Wyeth, and that these payments would be incurred "in addition to the applicable limit

[5]Although some of the words in the Midland Policy are illegible in the copies of the Policy offered into evidence, the parties agree that the text set forth above accurately quotes the Midland Policy (Pl.'s 56.1 ¶ 8; Def.'s Opp. 56.1 ¶ 8).

of liability," i.e., in addition to Midland's coverage of Wyeth for liability for damages due to bodily injury and property damage under the policy (Midland Policy, annexed as Ex. C to Stip., annexed in turn as Ex. 6 to Bannon Decl. ("The company will pay, in addition to the applicable limit of liability: all expenses incurred by the company, all costs taxed against the insured in any suit defended by the company and all interest on the entire amount of any judgment therein which accrues [during a specified time period]."")). Second, Endorsement 22 to the Midland Policy granted Midland the "right but not the duty" to defend Wyeth in certain foreign lawsuits, and that, should Midland elect not to defend Wyeth in such lawsuits, Midland would reimburse Wyeth for the reasonable costs of investigating and defending such suits so long as Midland was given the opportunity to supervise such investigation and defense:

> If claim is made or suit is brought elsewhere than within the United States of America, its territories or possessions, or Canada, the Company shall have the right but not the duty to investigate and settle such claims, and defend such suits.
>
> In any case in which the Company elects not to investigate, settle or defend, the insured[,] under the supervision of the Company, shall make or cause to be made such investigation and defense as are reasonably necessary and subject to prior authorization by the Company, will effect to the extent possible such settlement or settlements as the Company and the Insured deem prudent. The Company shall reimburse the Insured for reasonable costs of such investigation, settlement or defense.

(Midland Policy at NBK 0000399, annexed as Ex. C to Stip., annexed in turn as Ex. 6 to Bannon Decl.).

B. The Products Liability Lawsuits

Beginning in 1988, Wyeth's insured subsidiary, John Wyeth & Brother, Ltd., was named as a defendant in more than 11,000 products liability actions filed in the United Kingdom and Ireland relating to its manufacture and sale of prescription drugs containing benzodiazepine compounds, including Ativan (the "Ativan Lawsuits") (Pl.'s 56.1 ¶ 17; Def.'s Opp. 56.1 ¶ 17). See John Wyeth & Brother Ltd. v. Cigna Int'l Corp., 119 F.3d 1070, 1071-72 (3d Cir. 1997). All of the Ativan Lawsuits were resolved by either a judgment for Wyeth or a discontinuance; Wyeth paid no judgments to settle the foreign Ativan Lawsuits (Pl.'s 56.1 ¶¶ 17, 18; Def.'s Opp. 56.1 ¶¶ 17, 18).[6] However, Wyeth paid more than five million dollars in settlements and judgments in other products liability lawsuits for each of the policy years[7] covered by the Excess Policies (Complaint for Declaratory Judgment, dated Oct. 18, 2001, annexed as Ex. E to Foresta Decl.,

[6]Wyeth paid approximately $15,000 to settle an additional Ativan-related lawsuit brought in the United States (Lenza Dep. 120:20-22:19, annexed as Ex. S to the Declaration of Stephen G. Foresta, dated Mar. 5, 2004 ("Foresta Decl.")).

[7]Neither party has explained how it has allocated particular products liability claims to particular policy years.

¶¶ 13, 21; Answer, dated Nov. 27, 2001, annexed as Ex. F to Foresta Decl., ¶¶ 13, 21).[8]

C. The Dispute Over Reimbursement

Wyeth has demanded $1,766,955 from Allstate as reimbursement for its expenses in defending the Ativan Lawsuits (Pl.'s 56.1 ¶ 19; Def.'s Opp. 56.1 ¶ 19). Prior to the Ativan Lawsuits, Allstate had reimbursed Wyeth under the Excess Policies for the expenses of defending other products liability lawsuits. Although Allstate does not admit this fact in its submissions, Allstate's claim examiner and claim director testified to Allstate's prior reimbursement of Wyeth's product liability claims under the Excess Policies; however, they also testified, and Wyeth does not dispute, that Allstate's prior reimbursement of these claims was based on an analysis of the Excess Policies in conjunction with the terms of an agreement other than the Midland Policy (Saam Dep. 125:24-28:13, 129:21-30:8, 144:6-46:10, 291:20-93:7, annexed as Ex. 11 to Bannon Decl.; Hayes Dep. 133:8-

[8]In paragraph 21 of its answer to Allstate's state court complaint, Wyeth admitted that its five-million-dollar self-insured retention for products liability claims was exhausted for each of the policy years from July 1981 through July 1984, but denied Allstate's allegation that this exhaustion occurred by means of payment of settlements and judgments. However, Wyeth later admitted, during a conference call held on March 2, 2009 (the "March Conference Call"), that it had, in fact, exhausted the self-insured retention for each of the covered years by means of payments of settlements and judgments (Transcript of Telephone Conference, Mar. 2, 2009 ("Tr.") 6:18-7:8).

34:9, 137:13-22, 139:21-40:10, 140:21-41:14, annexed as Ex. 17 to Bannon Decl.; Wyeth's Memorandum of Law in Opposition to Allstate's Motion for Summary Judgment, dated Apr. 23, 2004 ("Def.'s Opp.") 20-21). After Wyeth submitted its demand for reimbursement in connection with the Ativan lawsuits, Allstate took the position that it was not obligated to reimburse Wyeth for such expenses (Letter from Terry Hayes, Claim Director, to John E. Wencelblat, American Home Products Corporation, dated Oct. 19, 2000, annexed as Ex. 18 to Bannon Decl.; Letter from Terry Hayes, Claim Director, to John E. Wencelblat, American Home Products Corporation, dated June 25, 2001, annexed as Ex. 20 to Bannon Decl.). It is this refusal by Allstate to pay that gives rise to this action.

D. Procedural History

Allstate commenced this action against Wyeth on October 22, 2001, in New York State Supreme Court, seeking a declaratory judgment that it was not obligated to reimburse Wyeth for its expenses in defending the Ativan Lawsuits (Def.'s 56.1 ¶ 5; Pl.'s Opp. 56.1 ¶ 5). On November 27, 2001, Wyeth answered Allstate's complaint, asserted affirmative defenses, sought a declaratory judgment that Allstate was obligated under the Excess Policies to reimburse Wyeth for defense expenses associated with the Ativan Lawsuits, and sought an award of $1,766,955.00, comprising the

total reimbursement due (Def.'s 56.1 ¶ 6; Pl.'s Opp. 56.1 ¶ 6). Wyeth removed the action to this Court on November 28, 2001 (Def.'s 56.1 ¶ 5; Pl.'s Opp. 56.1 ¶ 7). On December 5, 2003, the Honorable Deborah A. Batts, United States District Judge, endorsed an agreement between the parties tolling their respective claims for reimbursement and damages until a "final and non-appealable order" [sic] was entered with respect to the parties' requests for declaratory judgment (Tolling Agreement, Docket Item 18). The parties completed discovery and, on January 14, 2004, Judge Batts permitted the parties to file motions for summary judgment (Order, Docket Item 20).

III. Analysis

A. Jurisdiction and Choice of Law

Since the Court's subject matter jurisdiction is predicated on diversity of citizenship, New York's choice-of-law rules apply to determine what law applies to this matter. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941); Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1538-39 (2d Cir. 1997). In contract cases where the relevant agreements lack a provision setting forth the parties' choice of law, New York courts apply the law of the forum in which the "center of gravity" or "grouping of contacts" is located. Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317, 642 N.E.2d

1065, 1068, 618 N.Y.S.2d 608, 609 (1994); accord Lazard Freres & Co. v. Protective Life Ins. Co., supra, 108 F.3d at 1539.

Allstate asserts, and Wyeth does not dispute, that New York law governs the adjudication of the parties' rights and obligations under the Excess Policies (Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, dated Mar. 5, 2004 ("Pl.'s Br.") 6-8; Def.'s Br. 14). Both parties rely on New York law and do not claim that the law any other forum applies; "such 'implied consent . . . is sufficient to establish choice of law.'" Motorola Credit Corp. v. Uzan, 388 F.3d 39, 61 (2d Cir. 2004), quoting Krumme v. WestPoint Stevens, Inc., 238 F.3d 133, 138 (2d Cir. 2000). Accordingly, New York law applies to this matter.

B. Legal Principles

1. Summary Judgment

The standards applicable to a motion for summary judgment are well-settled and require only brief review.

> Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). This form of relief is appropriate when, after discovery, the party against whom summary judgment is sought has not shown that evidence of an essential element of her case -- one on which she has the burden of proof -- exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This form of remedy is inappropriate when the issue to be resolved is both genuine and related to a disputed

> material fact. An alleged factual dispute regarding immaterial or minor facts between the parties will not defeat an otherwise properly supported motion for summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990). Moreover, the existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).
>
> If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must "demonstrate more than some metaphysical doubt as to the material facts," and come forward with "specific facts showing that there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993). If the non-movant fails to meet this burden, summary judgment will be granted against it.

Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004); accord Binder & Binder PC v. Barnhart, 481 F.3d 141, 148 (2d Cir. 2007); Jeffreys v. City of New York, 426 F.3d 549, 553-54 (2d Cir. 2005); Gallo v. Prudential Residential Servs., Ltd., 22 F.3d 1219, 1223-24 (2d Cir. 1994); see also McPherson v. New York City Dep't of Educ., 457 F.3d 211, 215 n.4 (2d Cir. 2006) ("[S]peculation alone is insufficient to defeat a motion for summary judgment.").

> The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists . . . . In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant . . . . Stated more succinctly, "[t]he evidence of the non-movant is to be believed."

Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 253-54 (2d Cir. 2002) (citations omitted); accord Jeffreys v. City of New York, supra, 426 F.3d at 553 ("Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment.")(citations omitted); see also Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 142 (2d Cir. 2004).

2. Contract Interpretation

"The primary objective of a court in interpreting a contract is to give effect to the intent of the parties as revealed by the language of their agreement." Consub Delaware LLC v. Schahin Engenharia Limitada, 543 F.3d 104, 113 (2d Cir. 2008); accord W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162, 566 N.E.2d 639, 642, 565 N.Y.S.2d 440, 443 (1990). "A contract should be construed so as to give full meaning and effect to all of its provisions." Am. Express Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d 275, 277, 562 N.Y.S.2d 613, 614 (1st Dep't 1990), appeal denied, 77 N.Y.2d 807, 572 N.E.2d 52, 569 N.Y.S.2d 611 (1991); accord Parks Real Estate Purch. Group v. St. Paul Fire & Marine Ins. Co., 472 F.3d 33, 42 (2d Cir. 2006). "[T]he initial interpretation of a contract is a matter of law for the court to decide," Morgan Stanley Group Inc. v. New Eng. Ins. Co., 225 F.3d 270, 275 (2d Cir. 2000), and summary judgment

is appropriate where the language of the contract is "wholly unambiguous." Mellon Bank, N.A. v. United Bank Corp., 31 F.3d 113, 115 (2d Cir. 1994); see also Asheville Mica Co. v. Commodity Credit Corp., 335 F.2d 768, 770 (2d Cir. 1964).

> Whether a contract [provision] is ambiguous, however, is a "threshold question of law to be determined by the court." Duane Reade Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384, 390 (2d Cir. 2005); see also Morgan Stanley Group, Inc., 225 F.3d at 275 ("Part of this threshold interpretation is the question of whether the terms of the insurance contract are ambiguous." (citing Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, 136 F.3d 82, 86 (2d Cir. 1998))). "An ambiguity exists where the terms of an insurance contract could suggest 'more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" Morgan Stanley Group Inc., 225 F.3d at 275 (quoting Lightfoot v. Union Carbide Corp., 110 F.3d 898, 906 (2d Cir. 1997)); see also Duane Reade Inc., 411 F.3d at 390 (quoting Morgan Stanley Group Inc. for same). "An insurance policy should be read in light of common speech and the reasonable expectations of a businessperson." Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co., 13 A.D.3d 599, 788 N.Y.S.2d 142, 144 (N.Y. App. Div. [2d Dep't] 2004) (internal quotation marks omitted); accord Throgs Neck Bagels, Inc. v. GA Ins. Co. of N.Y., 241 A.D.2d 66, 671 N.Y.S.2d 66, 68-69 (N.Y. App. Div. 1998) (stating that courts are to construe the terms of an insurance contract as they are used in common speech).

Parks Real Estate Purch. Group v. St. Paul Fire & Marine Ins. Co., supra, 472 F.3d at 42.

In determining whether a contract provision is ambiguous, extrinsic evidence, such as the conduct of the parties, may not be considered. Bailey v. Fish & Neave, 8 N.Y.3d 523, 528,

868 N.E.2d 956, 959, 837 N.Y.S.2d 600, 603 (2007); accord South Road Assocs., LLC v. Int'l Bus. Mach. Corp., 4 N.Y.3d 272, 278, 826 N.E.2d 806, 809, 793 N.Y.S.2d 835, 838 (2005).

> A contract [provision] is not ambiguous "simply because the parties urge different interpretations," or if one side's reading "strain[s] the contract language beyond its reasonable and ordinary meaning." Simply put, a contract [provision] is not ambiguous where it "has a definite meaning, and where no reasonable basis exists for a difference of opinion about that meaning."

Union Switch & Signal, Inc. v. City of New York, 92 Civ. 6771 (MGC), 1994 WL 570789 at *3 (S.D.N.Y. Oct. 17, 1994) (internal citations omitted), quoting Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992), and Brass v. Am. Film Techs., Inc., 987 F.2d 142, 148 (2d Cir. 1993).

C. The Parties' Arguments

1. Existence of a Duty to Reimburse Defense Expenses

The first issue to be decided is whether the Midland Policy as applied to Allstate unambiguously would impose liability on Allstate for the payment of any of Wyeth's defense expenses and, if so, whether the provisions of the Excess Policies relieve Allstate of that liability. While Wyeth admits that the Excess Policies relieve Allstate of any duty to defend Wyeth, Wyeth nevertheless claims that the Excess Policies do not relieve Allstate of its obligation to reimburse Wyeth's defense expenses

with respect to the Ativan Lawsuits, which arise out of two other provisions in the Midland Policy.

i. The Supplementary Payment Provision

The Supplementary Payment provision of the Midland Policy (the "S.P. Provision") obligates the insurer to "pay, in addition to the applicable limit of liability[,] all expenses incurred by the company, [and] all costs taxed against the insured in any suit defended by the company . . ." (Midland Policy at NBK 0000372, annexed as Ex. C to Stip., annexed in turn as Ex. 6 to Bannon Decl.). Wyeth argues that the S.P. Provision creates an obligation on the part of Allstate to pay all expenses incurred by Wyeth in the event that Wyeth, rather than Allstate, defends a suit covered by the Midland Policy (Def.'s Br. 17-18; Def.'s Opp. 15). However, the Midland Policy defines "the company" to mean the insurer, Midland, not the insured (Midland Policy at NBK 0000374, annexed as Ex. C to Stip., annexed in turn as Ex. 6 to Bannon Decl. ("Midland Insurance Company (. . . herein called the company) . . . agrees with the named insured as follows: . . . ."")). Thus, the Policy provides that the insurer, whatever its identity, will pay its own expenses in the lawsuits that it defends. As a result, for the purposes of the underlying self-insurance, the S.P. Provision unambiguously provides that Wyeth, as the self-insurer of its own first five million dollars

in liability, is obligated to pay its own expenses. Likewise, for the purposes of the Excess Policies, the S.P. Provision states that Allstate, as the insurer, is obligated to pay its own expenses in suits defended by Allstate. Therefore, with respect to claims against which Wyeth defended itself in a suit covered by the Midland Policy, Allstate is not obligated to reimburse Wyeth's defense expenses under the S.P. Provision.

ii. Endorsement 22

Wyeth also claims that Endorsement 22 to the Midland Policy operates to require Allstate to reimburse Wyeth for defense expenses. Wyeth argues that the Endorsement "speaks specifically about those cases in which the insurer does not defend Wyeth and states that even in those cases, the insurer 'shall reimburse' defense costs" (Def.'s Opp. 15; see also Def.'s Br. 18). Allstate responds that the Endorsement relieves the insurer of part of its preexisting duty to defend the insured and instead, substitutes a duty to reimburse; Allstate further argues that because the Excess Policies exclude any duty to defend, Endorsement 22 does not apply to it (Def.'s Opp. 9-10).[9]

Where, as here, an insurance policy subjects an excess insurer to the terms of a underlying policy, the obligations of

[9]Allstate clarified its argument regarding this issue during the March Conference Call (Tr. 14:4-17:24).

the excess insurer are defined by the language of the underlying policy, except to the extent that there is a conflict between the policies or an express exclusion in the excess policy. Home Ins. Co. v. Am. Home Prods. Corp., 902 F.2d 1111, 1113 (2d Cir. 1990). Because the parties agree that the Midland Policy supplies the terms and conditions of the self-insured retention, which is the underlying policy for the purposes of Allstate's Excess Policies, Allstate's obligations under the Excess Policies are defined by the language of the Midland Policy, except to the extent that there is a conflict between the Midland Policy and the Excess Policies.

Endorsement 22 neither conflicts with nor is excluded by the Excess Policies. The Endorsement states that "the [insurer] shall have the right but not the duty to investigate and . . . defend" claims and lawsuits "brought elsewhere than within the United States of America, its territories or possessions, or Canada" ("foreign" claims and lawsuits) (Midland Policy at NBK 0000399, annexed as Ex. C to Stip., annexed in turn as Ex. 6 to Bannon Decl. (emphasis added)). If the insurer elects not to defend, Endorsemenet 22 further provides that if the insured investigates, settles or defends the claim under the supervision of the insurer, the insurer shall reimburse the reasonable costs of such investigation, settlement or defense. The language of the Endorsement is clear: it creates a right on the part of the

insurer to investigate and defend foreign claims and lawsuits and an obligation to indemnify with respect to such claims and lawsuits if the insurer elects not to defend. The language of the Excess Policies is equally clear: it excludes "the obligation to investigate and defend" all claims or lawsuits, foreign or domestic (1980 Policy at NB 00000114, 1981 Policy at WYETH 000753, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl. (stating that the Excess Policies are "subject to the same warranties, terms and conditions (except as regards . . . the obligation to investigate and defend . . . and except as otherwise provided herein) as are contained in" the self-insured retention (emphasis added))). Although the Midland Policy imposed both "the right and duty to defend any [law]suit against the insured" (Midland Policy at NBK 0000374, annexed as Ex. C to Stip., annexed in turn as Ex. 6 to Bannon Decl.), the Excess Policies excluded only the duty, but not the right, to defend such lawsuits.

Allstate argues that Endorsement 22 operates as a limitation on a general duty to defend lawsuits covered by the policy and that, because it has excluded any such duty to defend, the Endorsement has no effect. Allstate's argument is not supported by controlling precedent. The Excess Policies exclude "the obligation to investigate and defend" (1980 Policy at NB 00000114, 1981 Policy at WYETH 000753, annexed as Exs. A & B,

respectively, to Stip. annexed as Ex. 6 to Bannon Decl.). The duty imposed by Endorsement 22 is a duty, under certain circumstances, to indemnify Wyeth for the costs of investigating, settling or defending against certain claims. The duty to defend is, however, distinct from the duty to indemnify for defense costs and an excess insurer's exclusion of an obligation to defend does not override other policy provisions creating a duty to indemnify defense costs. Stonewall Ins. Co. v. Asbesos Claims Mgmt. Corp., 73 F.3d 1178, 1218 (2d Cir. 1995) (granting summary judgment in favor of insured and against excess insurer where excess policies excluded obligation to assume insured's defense and concluding that duty to defend is distinct from the duty to pay defense costs); see North River Ins. Co. v. Cigna Reins Co., 51 F.3d 1194, 1120 (3rd Cir. 1995) (fact that underlying insurer is obligated to defend "does not compel the conclusion that the insured also intended to relieve the excess insurer of all liability for defense costs accrued in excess of the primary insurer's limits -- especially when such costs would be incurred in an effort to avoid liability that the excess insurer would have to pay").

Here, the Midland Policy imposed two separate duties on the insurer: (1) the duty to defend the insured and (2) the duty to reimburse the insured for the reasonable expenses of defending foreign lawsuits under certain circumstances. The Excess Poli-

cies expressly eliminated only the former duty. Stonewall teaches that this exclusion does not, without more, eliminate the independent duty to reimburse certain defense expenses imposed by Endorsement 22. Thus, Endorsement 22 imposes a duty on Allstate to reimburse Wyeth's costs of defending foreign lawsuits under the stated circumstances, and the Excess Policies fully incorporate this duty.

2. Attachment of the Duty to Reimburse Defense Expenses

Having determined that Allstate is responsible for certain defense costs, it is necessary to resolve when Allstate's duty to reimburse these costs attached. Wyeth claims that Allstate's duty to reimburse Wyeth's defense expenses attached at the same time as Allstate's duty to pay Wyeth's judgments for damages attached, i.e., when Wyeth had paid five million dollars in products liability settlements or judgments attributable to a given policy year (Def.'s Opp. 10).[10] Allstate has not rebutted Wyeth's argument.[11]

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[10]Wyeth further explained this aspect of its argument during the March Conference Call (Tr. 3:24-6:17).

[11]During the March Conference Call, Allstate argued for the first time that its liability under the Excess Policies did not attach until after Wyeth had exhausted both its self-insured retention and a six million dollar AFIA "CSL Foreign" policy mentioned in Endorsement 4 to the Excess Policies (Tr. 11:8-

(continued...)

Allstate owed no duty to Wyeth under the Excess Policies until Wyeth's self-insured retention was exhausted (1980 Policy at NB 00000114, 1981 Policy at WYETH 000753, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl. ("[L]iability shall attach to [Allstate] . . . only after the issuer of the Underlying Policy ha[s] paid or has been held liable to pay the full amount of the applicable limit of the said policy . . . ."). At that point, the Excess Policies obligated Allstate to reimburse the costs of defending foreign lawsuits in accordance with Endorsement 22 and to indemnify Wyeth against judgments or settlements in accordance with the limits of the Excess Policies[12] (1980 Policy at NB 00000114, 1981 Policy at

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[11](...continued)
12:13). As noted above at note 4, because Allstate failed to raise that argument or even mention the AFIA policy in its briefs or Rule 56.1 Statements, I conclude this argument is waived.

[12]The parties dispute the limit of Allstate's duty to reimburse defense expenses. Allstate argued during the March Conference Call and in its reply brief that any reimbursement payments made pursuant to Endorsement 22 under the Midland Policy must be charged against Allstate's liability limit under the Excess Policies of five million dollars per policy year (Tr. 10:1-10:10; Pl.'s Reply 4 n.2). Wyeth denies that contention and argues that the Excess Policies do not limit Allstate's duty to reimburse Wyeth for defense expenses except that Allstate's duty to reimburse defense expenses ceases when Allstate has paid five million dollars in settlements or judgments (Def.'s Opp. 10). This dispute is not yet ripe for adjudication because the amount of Ativan defense expenses at issue during the years covered by the Excess Policies appears to be well under the Excess Policies' five-million-dollar limit, and neither party has offered evidence concerning the extent to which Allstate otherwise exhausted its five-million-dollar limit.

WYETH 000753, annexed as Exs. A & B, respectively, to Stip. annexed as Ex. 6 to Bannon Decl. ("[Allstate] hereby agrees to afford such additional liability insurance as the issuer of the Underlying Policy specified below would afford . . . in excess of Underlying Policy coverage which is subject to a limit listed below . . . ."). Therefore, Wyeth was responsible for all of its own defense expenses until it paid at least five million dollars in judgments or settlements; Allstate's duty to reimburse Wyeth certain of Wyeth's defense expenses attached at that point.

3. Whether the Requirements of Endorsement 22 Were Met

Endorsement 22 does not impose an unqualified duty to reimburse Wyeth's defense costs. Rather, with respect to claims made or suits brought outside of the United States, its territories or possessions and Canada, Allstate is obligated to reimburse the reasonable defense costs with respect to cases in which "the insured[,] under the supervision of [Allstate], shall make or cause to be made such investigation and defense as are reasonably necessary . . ." (Midland Policy at NBK 0000399, annexed as Ex. C to Stip., annexed in turn as Ex. 6 to Bannon Decl.). Thus, the reimbursement obligation is limited to matters in which Allstate supervises or is, at least, given the opportunity to supervise the investigation or defense.

Although there is evidence currently in the record before me that suggests with some force that Allstate was given this opportunity, Wyeth did not expressly argue in its motion that it was entitled to summary judgment on this matter and, thus, it is not clear that Allstate was on notice that this particular matter was in issue. Accordingly, I believe it would be inappropriate to resolve this issue on the record currently before me.

D. Summary

In sum, the parties are in agreement that Allstate's obligations under the Excess Policies are defined by the language of the Midland Policy, except to the extent that the Excess Policies exclude or conflict with that language. Wyeth has sustained its burden of proving that there is no genuine issue of fact that the terms of the Midland Policy obligate Allstate to reimburse Wyeth's defense expenses under the conditions set forth in Endorsement 22, and that the Excess Policies do not exclude or conflict with this obigation. Allstate has not come forward with specific facts showing that there is a genuine issue for trial as to the existence of this obligation. Furthermore, Wyeth has shown, and Allstate has not given cause to doubt, that Allstate's obligation pursuant to Endorsement 22 attached when Wyeth exhausted its payment of five million dollars in settlements or

judgments attributable to a particular policy year. However, a genuine issue of fact remains as to whether the conditions for the payment of defense expenses imposed by Endorsement 22 were met in this case.

IV. Conclusion

Accordingly, for all the foregoing reasons, Allstate's motion for summary judgment is denied, and Wyeth's cross-motion for summary judgment is granted in part and denied in part. Counsel are directed to report for a status conference on April 20, 2009 at 2:00 p.m. in Courtroom 18A, United States Courthouse, 500 Pearl Street, New York, New York 10007.

Dated: New York, New York
March 31, 2009

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

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